In re: Joel I. Keiler. Case AD–3

March 15, 1995

DECISION AND ORDER

CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

The issue in this case is whether Joel I. Keiler, the attorney for the respondent at a hearing before Administrative Law Judge Richard J. Boyce in *Barbary Coast Hotel and Casino*, Case 28–CA–9902, et al., engaged in ''misconduct of an aggravated character'' warranting discipline under Section 102.44(b) of the National Labor Relations Board's Rules and Regulations.[1] For the reasons set forth below, we find that Keiler committed such misconduct and that a suspension from practicing before the Board for a period of 1 year is warranted. We further find, for the reasons which follow, that Keiler has raised no issues of fact or law that require the Board to remand this matter for a hearing.

I. BACKGROUND

During the hearing in *Barbary Coast*, counsel for the General Counsel filed with Judge Boyce a motion to discipline respondent's attorney, Joel I. Keiler, requesting that the judge recommend to the Board that Keiler be disciplined in accord with Section 102.44 of the Board's Rules and Regulations. On February 12, 1992, Judge Boyce issued an ''Invitation to Show Cause'' why the General Counsel's motion should not be granted. On August 6, 1992, after considering statements in opposition filed by Keiler on May 7 and 26, 1992, along with further responses from counsel for the General Counsel and Keiler, Judge Boyce issued an order entitled ''Declination to Rule'' in which he declined to rule on the motion because, inter alia, (1) the Rules do not require that the judge rule; (2) the motion ''raises issues of profound importance to Mr. Keiler's career and professional reputation,'' the evaluation of which ''would demand the utmost in thoroughness and informed sensitivity,'' and would ''consume lavish amounts of time''; (3) the policies of the Act would be better served by the issuance of a decision on the merits; and (4) only the Board can impose the sanctions sought by the General Counsel.

On September 14, 1992, counsel for the General Counsel filed a ''Motion for Special Permission to Appeal Administrative Law Judge's Declination to Rule.'' The motion argued that as the trier of fact the judge is ''uniquely situated'' to evaluate the motion with informed sensitivity inasmuch as he presided over the hearing; and that the judge is in the best position to understand the nuances as well as the context of the incidents involved. The General Counsel requested that the Board reverse the judge and direct him to consider and rule on the General Counsel's motion.

On October 15, 1992, after considering opposition from Keiler, the Board granted the General Counsel's motion, vacated the judge's order, and remanded to Judge Boyce for the ''preparation of a recommended decision and order on the matters raised in the General Counsel's motion to discipline.''[2]

On December 30, 1993, more than a year later, Judge Boyce ruled on the General Counsel's motion to discipline. Providing only a brief chronological account of the attorney-discipline matter, Judge Boyce, without providing any rationale or discussion of the issues involved, issued a one-line ruling, to wit: ''I hereby deny the General Counsel's motion.'' Two days later Judge Boyce retired.[3]

II. THE GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL

On February 15, 1994, counsel for the General Counsel filed a request for special permission to appeal Judge Boyce's ruling, contending that the Board's Order implicitly directed the judge to prepare a fully articulated decision on the General Counsel's motion to discipline and that Judge Boyce ignored the Board's Order and failed to comply with the requirements of Section 102.45(a) of the Board's Rules and Regulations. Accordingly, the General Counsel requests that the Board grant the special appeal, reverse Judge Boyce's ruling, and transfer the matter to the Board for the purpose of conducting a de novo review of the

[1] Sec. 102.44 provides, in relevant part, as follows:

(a) Misconduct at any hearing before an administrative law judge or before the Board shall be ground for summary exclusion from the hearing.

(b) Such misconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.

[2] The Board directed Judge Boyce to issue his decision in the unfair labor practice proceeding (Case 28–CA–9902) before ruling on the motion to discipline. On January 29, 1993, Judge Boyce issued his decision in the unfair labor practice proceeding. On September 24, 1993, the General Counsel, on behalf of the parties, filed a joint motion requesting withdrawal of the exceptions filed by the Charging Party and the Respondent and cross-exceptions filed by counsel for the General Counsel, and advising that the parties had entered into a collective-bargaining agreement as well as a settlement agreement remedying the unfair labor practices. On October 4, 1993, the Board granted the joint motion and remanded the proceeding to the Regional Director for Region 28 for further appropriate action.

[3] As noted above, the Board vacated Judge's Boyce's order entitled ''Declination to Rule'' and remanded to the judge for ''preparation of a decision on the matters raised in the General Counsel's motion to discipline.''

The Board's remand anticipated issuance of a fully articulated decision by the judge ruling on matters raised in the General Counsel's motion to discipline. We deplore Judge Boyce's failure to follow what was implicit in the order remanding and his choice to limit himself to a summary denial of the General Counsel's motion.

record and issuing a decision on the motion to discipline.[4]

In support of his request, the General Counsel relies on the motion to discipline filed with Judge Boyce on February 4, 1992. As detailed therein, the General Counsel's motion to discipline rests on four basic grounds:

> (1) Ad hominem comments and scurrilous characterizations of counsel for the General Counsel.
>
> (2) Misuse of an affidavit provided to Keiler by counsel for the General Counsel.
>
> (3) Direction of a racial slur toward counsel for the General Counsel.
>
> (4) Misrepresentations to the judge and obstruction and delay of the hearing.

III. KEILER'S RESPONSE TO THE MOTION TO DISCIPLINE

It is undisputed that Attorney Keiler responded to the General Counsel's motion to discipline, both on the record and in the form of statements in opposition, and he has done so both before Judge Boyce and after the General Counsel renewed his motion before the Board. Before Judge Boyce, Keiler filed an 11-page document which addresses arguments raised in the motion to discipline.

Briefly summarized, Keiler argues that none of the alleged ad hominem comments constitute misconduct of an aggravated character; that in regard to the alleged misuse of an affidavit, nothing in the Board's Rules and Regulations prohibits use of an affidavit for purposes other than use in cross-examination and that the Rules do not even require that the affidavit be returned to the General Counsel; that the alleged ''gross misrepresentation'' regarding testimony as to the supervisory status of Betty Bergsund is no misrepresentation at all; that regarding another ''gross misrepresentation'' concerning the General Counsel's position regarding impasse, it is the General Counsel who engaged in the misrepresentation; that he did not make a racial slur; and that the alleged obstruction of the hearing involving Employer Representative Gaughan's failure to honor a subpoena was an attempt by the General Counsel to obtain from the administrative law judge a ruling the General Counsel was unsuccessful in obtaining from the district court.

Keiler's response to the General Counsel's request for special permission to appeal directs the Board's attention to six cases he has tried before other administrative law judges in the past 2 years, none of which were the occasion for proposed sanctions.[5] To the contrary, Keiler contends that Judge Goerlich ''suggested on several occasions that Keiler apply for upcoming vacancies in the ALJ Division.'' Keiler further argues that the Board should affirm the administrative law judge's order but that ''if Judge Boyce is to be second guessed, then Keiler would like a hearing to present the views of Judges Goerlich, West, Roth, Wolfe, and Wacknov.''

On July 26, 1994, the Board issued an order directing Keiler to show cause why he should not be suspended from practice before the Board for 1 year based on his conduct before Administrative law Judge Richard Boyce. The Board's Order put Keiler on notice that any response ''should set forth all arguments raised in defense, and the specific evidence supporting such arguments.''

On August 29, 1994, Keiler, acting through counsel, filed a response raising five arguments:

> (1) The Fifth Amendment of the Constitution and Section 102.44 require ''a specification of the acts of alleged misconduct and a hearing . . . .''
>
> (2) The notice to show cause fails to specify which, if any, of the General Counsel's assertions the Board believes has merit.
>
> (3) Counsel cannot prepare in the absence of a specification of the charges against Keiler, particularly as to which conduct falls under Section 102.44(a) and conduct which is alleged to warrant sanctions under Section 102.44(b).
>
> (4) After being informed of the specific conduct in issue under Section 102.44(b) Keiler is entitled to a hearing ''so he will be able to confront the evidence and witnesses against him . . . .''
>
> (5) The notice to show cause is procedurally defective in that the Board granted the General Counsel's request for special appeal notwithstanding that the General Counsel only requested that (a) the matter be transferred to the Board for de novo review or (b) the matter be assigned and remanded to another administrative law judge.

IV. DISCUSSION

Having duly considered the entire record in this proceeding, we grant the General Counsel's request for special permission to appeal, and we transfer this matter to the Board for de novo review of the record and issuance of a decision on the motion to discipline. In the sections of our decision that follow, we will first set forth the reason why there is no merit in Keiler's claim that he is entitled to an oral or trial-type hearing

[4] The General Counsel requests that the Board review this matter without conducting any further hearing because, in the General Counsel's view, a further hearing is unnecessary as Keiler has already had a full opportunity to respond, an opportunity he took advantage of by filing ''several comprehensive responses and replies . . . .''

[5] The administrative law judges named before whom Keiler appeared are: Lowell Goerlich (two hearings), John West, Marvin Roth, Claude Wolfe, and Gerald Wacknov.

in this matter. After reviewing prior instances of misconduct on Keiler's part, we will proceed to examine the four main grounds asserted by the General Counsel as the basis for his motion to discipline.

A. *Whether the Board Must Remand for a Disciplinary Hearing Before Imposing Sanctions*

It is well established that the courts must provide reasonable notice and an opportunity for hearing before suspending or disbarring an attorney,[6] and both due process[7] and the Board's own Rules[8] require that the Board do so. Such procedural safeguards (1) ensure that the attorney has an adequate opportunity to explain his conduct; (2) afford the disciplinary authority adequate time to evaluate the propriety of the particular sanction in light of the attorney's explanation, and to consider alternatives; and (3) provide a record for appellate review.[9]

However, a separate disciplinary hearing is not automatically required if the attorney has been afforded an opportunity in the underlying proceeding in which the alleged misconduct occurred to adduce the relevant facts, and the record from that proceeding is adequate for review.[10] Further, an attorney may waive any right to a disciplinary hearing, either expressly or implicitly, by failing to respond.[11] The ABA Model Rules concerning attorney discipline indicate that a hearing may also be dispensed with where the answer or response to a show cause order fails to raise any material factual issues and does not request an opportunity to be heard in mitigation.[12]

Based on the above, we believe that sanctions, including suspension, can be imposed on Keiler without further hearing because:

(1) Keiler's alleged misconduct occurred on the record of the unfair labor practice proceeding.

(2) Keiler has been given and taken advantage of several opportunities, both on the record at the unfair labor practice hearing, to explain his conduct, and any reasons for mitigation if misconduct is found, and his explanations are also contained in the record now before the Board.

(3) Keiler's defenses as set forth in the record do not dispute that the alleged conduct occurred, but only the General Counsel's interpretation of such conduct.

Although Keiler has specifically requested a hearing in his opposition to the General Counsel's special appeal, he has apparently done so solely to present testimony concerning his good trial manners from several administrative law judges before whom he has appeared in the last 2 years. Such testimony might arguably be relevant regarding mitigation (i.e., as tending to show that his conduct in *Barbary Coast* was isolated and/or that he generally has a good reputation). As discussed infra, however, Keiler's history of misconduct in Board proceedings is so well documented in other published Board decisions that his conduct in *Barbary Coast* cannot reasonably be viewed as an isolated exception to a record of otherwise exemplary behavior.[13]

Finally, Keiler's response to the Notice to Show Cause raises no evidentiary or procedural issues that require a hearing. Thus, responses (1) through (4)[14] are essentially variations on a theme: the Notice to Show Cause fails to apprise him of the conduct against which he must defend himself. In the context of the instant case, Keiler misapprehends the purpose of the Notice to Show Cause issued by the Board and accept-

---

[6] See *Eash v. Riggins Trucking*, 757 F.2d 557, 570 (3d Cir. 1985); *In re Ming*, 469 F.2d 1352, 1355–1356 (7th Cir. 1972).

[7] See 4 Stein, Mitchell, and Mezines, Administrative Law (hereinafter Administrative Law) Sec. 42.04[1] (''The application of due process protections [to Agency disciplinary proceedings] is virtually uncontested since divesting an attorney, by disbarment or suspension, of the ability to practice constitutes the 'deprivation of a valuable right.'''') See also *Goldsmith v. Bd. of Tax Appeals*, 270 U.S. 117, 123 (1926).

[8] See Sec. 102.44(b) and Sec. 102.66(d)(2) (''[M]isconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.'').

[9] *Eash*, supra, 757 F.2d at 571.

[10] See id. (''In some cases, it may be that the record developed at the time of the alleged misconduct will, itself, satisfy this need [for a record on review] as long as the attorney has been afforded an opportunity to adduce the relevant facts.'').

[11] Administrative Law, supra, note 7, Sec. 42.04[2].

[12] See ABA Model Rules for Lawyer Disciplinary Enforcement (state courts), Rule 11(D)(4), Lawyers Guide for Professional Misconduct (ABA/BNA) 01:609 (''If there are any material issues of fact raised by the pleadings or if the respondent requests the opportunity to be heard in mitigation, the [hearing committee] [board] shall serve a notice of hearing upon disciplinary counsel and the respondent . . . .''); and American Bar Association Model Federal Rules of Disciplinary Enforcement (Federal courts), Rule V(D), Lawyers Guide 01:704 (''Upon the respondent-attorney's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation this Court shall set the matter for prompt hearing . . . .''). See also *Eash v. Riggins Trucking*, supra, 757 F.2d at 571 (noting in remanding case that in that case the attorney by affidavit had disputed the factual predicate on which the court's order was based).

[13] See *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561 fn. 5 (1979); *Maietta Contracting*, 265 NLRB 1279 (1982); and *Blake Construction Co.*, 245 NLRB 630 fn. 1 (1979).

[14] In his response to the Notice to Show Cause, Keiler stated: (1) the Fifth Amendment of the Constitution and Sec. 102.44 require ''a specification of the acts of alleged misconduct and a hearing''; (2) the Notice to Show Cause fails to specify which, if any, of the General Counsel's assertions the Board believes has merit; (3) counsel cannot prepare in the absence of a specification of the charges against Keiler, particularly as to which conduct falls under Sec. 102.44(a) and conduct which is alleged to warrant sanctions under Sec. 102.44(b); (4) after being informed of the specific conduct in issue under Sec. 102.44(b) Keiler is entitled to a hearing ''so that he will be able to confront the evidence and witnesses against him . . . .''

ing Keiler's logic would stand the Board's Order on its head.[15]

Contrary to his self-serving response to the show cause order, Keiler *has been* apprised of the conduct in issue, not once, but twice: first, when the motion to discipline was filed before the administrative law judge in 1992 during the hearing; and second, when it was renewed before the Board after the administrative law judge summarily denied the General Counsel's motion to discipline on December 31, 1993. More importantly, Keiler also responded (or had the opportunity to do so) on the record at the unfair labor practice hearing to the allegations raised in the General Counsel's motion.[16]

Finally, response (5), which alleges that the Notice to Show Cause is procedurally defective because the ''Board granted the General Counsel's request for special appeal'' is both frivolous and untrue. Suffice it to say that, until now, the Board has neither granted the request for special permission to appeal nor ruled on the merits thereof.[17]

In such circumstances, we find that, even if it is true, as Keiler claims, that he exhibited good trial manners in the recent cases he cites, Keiler has raised no issues warranting a further hearing in this matter.

B. *Prior Misconduct Cases Involving Keiler*

Because Attorney Keiler is no stranger to proceedings involving alleged misconduct before the Board, such proceedings provide an appropriate backdrop against which to judge the specific allegations involved in the motion to discipline.

In 1979, the Board expressed its ''strong disapproval'' of Keiler's ''unprofessional and unseemly remarks, particularly his comments claiming senility of the Administrative Law Judge . . . .'' *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561 fn. 6 (1979).

Three years later, in *Maietta Contracting*, 265 NLRB 1279 (1982), the Board considered Keiler's argument that Administrative Law Judge George Norman was biased against the respondent and Keiler's attack on Judge Norman's competence. Keiler's brief in support of respondent's exceptions contained a litany of alleged improprieties committed by the administrative law judge and also alleged improper conduct on the part of the General Counsel.

In denying Keiler's exceptions, the Board observed:

> We have carefully considered the record and find Respondent's charges to be entirely without merit. In fact, we believe that these charges may be an attempt to distract the Board from Respondent's own illegal conduct. Moreover, we are by now all too familiar with Respondent's attorney Joel I. Keiler's groundless accusations against administrative law judges. See *Southern Florida Hotel & Motel Association, and its employer-members, The Estate of Alfred Kaskel d/b/a Carillon Hotel; The Estate of Alfred Kaskel d/b/a Doral Hotel and Country Club; The Estate of Alfred Kaskel d/b/a Doral Beach Hotel*, 245 NLRB 561, fn. 6 (1979), wherein the Board found that Keiler made ''unprofessional and unseemly remarks'' which were ''totally inappropriate and uncalled for''; and *Blake Construction Co., Inc., M & S Building Supplies, Inc.*, 245 NLRB 630, fn. 1 (1979), in which the Board found Respondent's ''various contentions regarding the bias and competency of the Administrative Law Judge'' to be without merit. At this point, we are beginning to grow weary of responding to Keiler's disingenuous cries of ''wolf.'' *Moreover, we find that Keiler behaved inappropriately and unprofessionally throughout the hearing, and that the Administrative Law Judge's constant need to reprimand him unnecessarily prolonged this case. However, we will not at this time sua sponte institute disciplinary proceedings against Keiler. We trust that, in his subsequent appearances before the Board, it will be unnecessary for us to consider doing so*. [Emphasis added.][18]

Against this well-documented background of inappropriate and unprofessional conduct, we turn our attention to the specific conduct which forms the basis for the General Counsel's motion to discipline in this proceeding. We consider each allegation in turn.

C. *The General Counsel's Motion to Discipline*

1. Ad hominem comments and scurrilous characterizations of the General Counsel

As set forth in the motion to discipline and established by the record, at various times during the *Barbary Coast* hearing[19] Keiler directed the following remarks at counsel for the General Counsel, Cornele Overstreet:

---

[15] Black's Law Dictionary (p. 1549) defines a show cause order as ''an order . . . to appear as directed, and present to the court such reasons and considerations as one has to offer why it should not be confirmed, take effect, be executed or as the case may be.''

[16] See sec. VI,B, infra.

[17] As set forth above under ''Background,'' on October 15, 1992, the Board granted the General Counsel's initial request for special permission to appeal the administrative law judge's order declining to rule on the General Counsel's motion to discipline filed before Judge Boyce while the hearing was in progress.

[18] We also note that in 1977 the D.C. court of appeals suspended Keiler for 30 days based on the ground that he secretly hired his partner as an arbitrator and portrayed him as having a Florida address. *In the Matter of Keiler*, 380 A.2d 119 (D.C. Court of App. 1977).

[19] This case was heard from August 7, 1990, through July 17, 1991, and resulted in a record of more than 3000 pages.

> He's [Overstreet's] a liar. He lied to the Board. He's lied to me. Your Honor, you've chastised me very often for calling this gentleman [Overstreet] a liar. I'm doing it again. I think that Mr. Overstreet has committed a fraud upon the Court.

Keiler's attack on Overstreet led to the following discussion:

> MR. KEILER: Well, Your Honor, my contention is Counsel for the General Counsel is clearly trying to pull the wool over the eyes of the NLRB and the wool is only—is 45 percent rayon.
>
> JUDGE BOYCE: Well, you've tried to make the point throughout this hearing that sleaze is Mr. Overstreet's stock in trade, and I just don't buy it.
>
> MR. KEILER: I don't know about his stock and trade other than this case. This is the first time I've been involved with Mr. Overstreet. That's certainly my contention in this case, yes, Your Honor.

On another occasion, after the administrative law judge suggested to counsel for the General Counsel Overstreet that he sometimes suffered from an ''excess of courtesy,'' Keiler remarked, ''When you don't tell the truth, you have to do something else.'' In response, Judge Boyce told Keiler: ''[T]hat's a cheap shot, it's really unwarranted.''

At another time Keiler stated: ''Your Honor, you've chastised me very often for calling this gentleman [Overstreet] a liar. I'm doing it again.'' Responding to the General Counsel's motion to warn Keiler to refrain from any further misconduct, Keiler stated: ''It is true that I have called Mr. Overstreet a liar, the record is replete with it. Clearly I can't deny it. But clearly truth is a defense.''

As detailed above, it is undisputed that Keiler repeatedly referred to counsel for the General Counsel Overstreet as a ''liar'' even after being ''chastised'' (Keiler's word) by the administrative law judge, and accused Overstreet of having ''committed a fraud upon the Court.'' Keiler's repeated accusations that opposing counsel is a ''liar,'' coupled with his admission that he has been ''chastised'' by the trial judge for doing so, obviate any suggestion that Keiler's accusations were provoked or represented a one-time response in a moment of pique. Rather, the more reasonable inference, and one which we draw, is that Keiler's conduct was an intentional and calculated effort to intimidate opposing counsel.

Such conduct has been condemned by other tribunals.[20] If the judicial process is to function properly, certain basic ground rules are essential, not the least of which is that a lawyer should avoid ''unfair or derogatory personal references to opposing counsel.''[21] Repeatedly labeling opposing counsel as ''a liar'' and accusing him of committing ''a fraud upon the court'' certainly meets the definition of the term ''derogatory.''[22] Accordingly, we find that Keiler's misconduct is ''aggravated'' and warrants the imposition of sanctions under Section 102.44(b) of the Board's Rules.

2. Misuse of an affidavit provided to Keiler by the General Counsel

The alleged inappropriate use of an affidavit occurred the day after Keiler was provided with a copy of Union Business Representative Julie Pearlman's February 2, 1990 affidavit. On December 7, 1990, Keiler filed with the U.S. district court, where a related 10(j) proceeding was being heard, an amendment to Respondent's opposition to petition for injunction. The business representative's affidavit was attached to Keiler's opposition.

The General Counsel contends that Section 102.118(b)(2) of the Board's Rules and Regulations limits affidavits provided by the General Counsel to use in cross-examination. We note, however, that the NLRB Casehandling Manual (Part I) Unfair Labor Practice Proceedings, Section 10394.11, specifically provides that counsel may retain the affidavit until the hearing is closed and utilize it ''for legitimate trial purposes.'' In the circumstances of this case, and because the 10(j) proceeding is arguably related to the hearing

---

[20] See addendum to Supreme Court of Delaware's decision in *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Feb. 4, 1994). During depositions in *Paramount*, one of the attorneys engaged in conduct which the Supreme Court of Delaware characterized as demonstrating ''such an astonishing lack of professionalism and civility that it is worthy of special note . . . as a lesson for the future—a lesson of conduct not to be tolerated or repeated.'' Id. at 52. Like the court in *Paramount*, we find Keiler's ''unprofessional behavior to be outrageous and unacceptable.'' 637 A.2d at 52.

[21] *Johnson v. Trueblood*, 476 F.Supp. 90, 96 E.D. Pa. (1979), vacated on other grounds 629 F.2d 302 (3d Cir. 1980).

[22] *U.S. v. De Geratto*, 876 F.2d 576 (7th Cir. 1989).

We do not, however, rely on the General Counsel's allegation that Keiler referred to a witness as a ''Nazi Moron,'' an incident which provides perhaps the only levity, albeit unintentional, to be found in this otherwise dreary hearing.

This allegation arose in the context of redirect examination by counsel for the General Counsel of Union Representative Mitch Streeter. During the course of examining Streeter, the General Counsel reviewed Streeter's prior testimony regarding ''the union informing the police about security guards bumping individuals on the picket line . . . .'' In explaining how this information was conveyed to the police, Streeter testified that ''I approached one of the intelligence plain clothes officers from Metro by name of Rance Reddick.'' When asked how he knew Reddick was with the police department, Keiler interposed: ''move to strike: Nazi Moron, Your Honor.''

In context, it seems clear that Keiler's idea of humor is to suggest that ''intelligence plain clothes officers'' is an ''oxymoron'' and that the word was erroneously transcribed as ''Nazi Moron'' by the court reporter. We find that this allegation does not provide a basis for disciplinary action.

before the Board on the merits, we find that this allegation provides no basis for disciplinary action.

3. Direction of a racial slur toward counsel for the General Counsel

The alleged racial slur directed toward counsel for the General Counsel Overstreet, who is black, occurred in the course of a colloquy before Judge Boyce during which Keiler believed that counsel for the General Counsel had made an offer which Keiler had accepted. When Overstreet disagreed, Keiler stated: ''He made the offer[.] I took him [up] on it, and now he's back tracking. He['s] shucking and jiving[23] as fast as he can.''

In response to this allegation, Keiler, professing embarrassment to go into the matter, denied that ''shuckin' and jivin''' is a racist remark. He then proceeded to ''parade out [his] credentials,'' including taking a day off to participate in Martin Luther King's March on Washington, contributions to the NAACP Legal Defense Fund, and attendance at NAACP meetings with Deputy Chief Administrative Law Judge Earldean Robbins.

Whether Keiler's use of the phrase ''shuckin' and jivin','' directed toward a black attorney, rises to the level of a racial epithet presents a close issue. However, for the reasons which follow, we do not rely on this as a ground for disciplinary action.

While Keiler's testimony may be self-serving, we note that counsel for the General Counsel Overstreet did not object to Keiler's remark, either when it was made, or after Keiler responded when the motion to discipline was considered by Judge Boyce.[24] On balance, we do not rely on this allegation.

4. Obstruction and delay of the hearing and misrepresentations to the administrative law judge

The hearing in *Barbary Coast* opened on August 7, 1990. During the week before the hearing opened, the General Counsel sought to serve a subpoena duces tecum on Michael John Gaughan, respondent's managing partner, seeking production of a variety of documents. A receipt showing service was signed by the respondent's general manager, Leo Lewis. Respondent Counsel Keiler filed a petition to revoke. When asked by Judge Boyce if he was contending that the subpoena was never received, Keiler responded: ''No, I'm contending the subpoena was made out to a person, G-U-A-G-H-A-N, there is no such person.''[25] When the judge suggested that Keiler knew the person to whom the subpoena referred to and that the ''A'' and the ''U'' were transposed, the following colloquy took place:

> KEILER: I might have—I might have to guess, but why should I have to guess? This doesn't sound like the subpoena.
>
> JUDGE BOYCE: Well, that's—that's trifling. You really don't advance your adversarial thrust by making that argument . . . .
>
> KEILER: Well, I'm making that argument. I wish to preserve it for the Court of Appeals.

In the afternoon session, Keiler adhered to his position and renewed his petition to revoke.

> KEILER: I know you've made some remarks concerning my argument this morning, but I renew them. The name listed in the complaint is not the name on the subpoena.
>
> JUDGE BOYCE: Well, would you—for the record—would you elaborate.
>
> KEILER: Yes. There is a name in the complaint—Michael Gaughan.
>
> JUDGE BOYCE: Which is the correct spelling, is it not?

After taking Keiler through the spelling in the complaint and in the subpoena, Judge Boyce asked:

> And you have no idea who that refers to; is that what you're telling me?
>
> KEILER: I'm telling you I have no idea who G-U-A-G-H-A-N this is.
>
> JUDGE BOYCE: Well, I think I'm telling you that that's palpably frivolous. It's an absurd argument.
>
> It really doesn't serve you or your client well to make that kind of argument, Mr. Keiler. We might as well get that straight right here and now. Let's get off this petty, frivolous baloney and start dealing with substance. It's really absurd. And I know this morning you said—well, you wanted to make your record for some reviewing authority.
>
> I can tell you that none—if you presented that kind of argument to a certain court, they would hoot you out; they would totally destroy your credibility as an advocate. As I say, you disserve yourself and your client immensely. And you just don't do that to yourself and then don't burden

[23] See the Oxford English Dictionary, Second Edition, 1989 (p. 288) and the New Dictionary of American Slang (p. 388) where ''shuckin' and jivin''' is defined as ''fooling,'' ''fooling around,'' etc., or as one author used the term: ''For many blacks, 'shucking' and jiving' is a survival technique to avoid and stay out of trouble.'' Judge Boyce, while acknowledging his lack of expertise, held that ''I am not convinced that Mr. Keiler's use of that term was in any way prompted by your [Overstreet's] being black.''

[24] Counsel for the General Counsel stated on the record that this allegation was included on specific instructions from the Regional Director and the Regional attorney.

[25] In a motion for a continuance, dated August 6, 1990, and addressed to Deputy Chief Administrative Law Judge Earldean Robbins, Keiler alluded to a subpoena duces tecum served on a ''nonexistent person.''

this forum with this kind of stuff. We don't have time for it.

We agree wholeheartedly with Judge Boyce's comments. Filing a petition to revoke a subpoena based on a typographical error goes far beyond the bounds of fair advocacy. As the judge stated, Keiler's argument was ''absurd'' and ''frivolous.'' Keiler's conduct constitutes nothing less than a blatant attempt to obstruct and delay the unfair labor practice hearing.

Although finally appearing at the hearing and testifying on August 7, 1990, Gaughan produced only a portion of the documents requested in the subpoena. Keiler initially offered no specific grounds for revocation and, as a result, much of the first day of the hearing required dealing with objections raised by Keiler. Among the matters in dispute was paragraph 15—a ''list'' of the rates of pay of employees in each of the respondent's job classifications on various dates.

The parties appeared to resolve this dispute when Keiler declared that he was ''never going to be arguing about it again'' and stated that the General Counsel ''was going to get exactly what [he] asked for . . . .'' When the hearing resumed on September 17, 1990, however, Keiler failed to provide the promised list, informed the judge that no such list existed, and took the position that the Respondent had ''no duty to make lists.'' Keiler provided no explanation for first promising to provide the list and later denying the existence of the list.

A second subpoena served on the respondent in November 1990 requested production of a variety of documents, including Keiler's notes from collective-bargaining negotiations with the Union. On December 4, 1990, Judge Boyce denied the respondent's petition to revoke ''in toto'' whereupon Keiler informed the judge that he ''would comply with the order and it would be at the earliest convenience.'' Although Judge Boyce directed the Respondent to ''comply fully'' with the subpoena not later than the close of business on December 14, 1990, the respondent failed to comply. When the hearing resumed on January 15, 1991, Keiler announced: ''I have not complied with the subpoena [duces tecum].'' Again, Keiler provided no explanation for first promising to comply with the subpoena and later announcing that he has not complied.

Keiler's tactics forced the General Counsel to apply to the district court for enforcement, which was granted March 13, 1991. But it was not until the last day of the hearing, July 17, 1991, 7 months after Judge Boyce directed him to comply, that Keiler supplied the General Counsel with his bargaining notes.

Keiler also prolonged the hearing by refusing to verify subpoenaed documents, an action that produced the following observation from Judge Boyce:

> I've never, uh, I don't mean to sound like an old man that has been doing this forever, but in all my time as a judge I've never encountered this kind of reluctance on the part of a producing party to at least verify that, ''yes'' I did produce these things. It prolongs things pointlessly, in my view, and it is really regrettable.
>
> . . . .
>
> But I really think that this sort of thing is obstructionist. It serves no short o[r] long term purpose.
>
> . . . .
>
> It imposes an economic fee burden on your client this is, uh, pointless. I just don't see any constructive purpose at all in this . . . .

In agreement with the trial judge in this case, we find that Keiler's conduct ''prolong[ed] things pointlessly,'' that ''this sort of thing is obstructionist'' and ''serves no constructive purpose at all.'' The Board does not, of course, suggest that a party served with a subpoena has no right to move for revocation or to force the General Counsel to seek enforcement before the appropriate U.S. district court. However, given Keiler's failure to proffer any explanation for his conduct, we are constrained to conclude that Keiler was motivated by nothing more than a desire to obstruct and delay the hearing.

Keiler's efforts to obstruct and delay the exercise of the broad subpoena authority vested in the Board under Section 11 of the Act are indefensible. A subpoena, whether designed to secure testimony or the production of relevant documents, is not a suggestion to appear and provide requested evidence when mutually convenient; neither is it ''an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase.'' *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 34 (1st Cir. 1981), quoting *U.S. v. Bryan*, U.S. 323, 331 (1950).

Accordingly, we find that Keiler's obstruction and delay of the hearing before Judge Boyce in *Barbary Coast* constitutes ''aggravated'' misconduct and provides a basis for disciplining him under Section 102.44(b) of the Board's Rules.[26]

[26] In support of his claim of ''gross misrepresentations'' to Judge Boyce, the General Counsel argues that Keiler told the judge that GCX 86, an exhibit the General Counsel was handing to a witness, was a ''fraudulent document.'' Other matters raised as misrepresentations involve a dispute as to whether Keiler claimed that a union representative had testified that he did not return to the employer's premises after an altercation with Employer President Gaughan, whether Keiler misrepresented to the judge that the General Counsel had conceded that there was a firm and final offer from the respondent, whether Keiler misrepresented the judge's view of testimony by witness Mendoza, and whether Keiler misrepresented a Nevada statute as providing that ''anything in the newspapers is prima facie accurate'' whereas the statute actually states that ''printed materials purporting to be newspapers or periodicals are presumed to be authentic.''

Continued

V. *Summary and Conclusion*

In *Maietta Contracting*, supra, 265 NLRB at 1280, the Board found that Attorney Keiler ''behaved inappropriately and unprofessionally throughout the hearing, and that the Administrative Law Judge's constant need to reprimand him unnecessarily prolonged this case.''[27] *Maietta* also suggests that Keiler escaped further sanctions only because the Board declined sua sponte to institute disciplinary proceedings against him. At a minimum, *Maietta* placed Keiler on notice that he proceeded at his peril if he engaged in further misconduct.

Prior warnings and admonitions clearly have made no impression on Keiler and, indeed, have had little, if any, effect on his behavior before the Board. To the contrary, Keiler has blatantly ignored prior warnings and admonitions and chosen to pursue the same course of unprofessional, inappropriate, and unethical conduct which has marked his appearance in other cases before this Agency.

We have found above that at the hearing in *Barbary Coast* Keiler engaged in two kinds of ''misconduct of an aggravated character'' under Section 102.44(b). First, Keiler repeatedly and intentionally labeled counsel for the General Counsel a ''liar'' and accused him of committing ''a fraud upon the Court.'' Second, Keiler engaged in tactics that had no apparent purpose other than to obstruct and delay the unfair labor practice hearing. We conclude that such behavior is outrageous and totally unacceptable in Board proceedings. We are no longer willing, as we have in the past, to limit our expressions of disapproval to a warning or admonition to refrain from such conduct in the future.

Keiler's failure to heed prior warnings and admonitions persuades us that the time has come to impose stronger disciplinary action which, we trust, will drive home to Keiler a simple and straightforward message: the Board will no longer tolerate the type of misconduct that marked Keiler's appearance before the administrative law judge in this case.

Lest there be any doubt in Mr. Keiler's mind about how seriously the Board takes this matter and how determined we are that conduct of this type will not be tolerated in Board proceedings, we find, based on the record as a whole in this case, that Keiler's ''aggravated misconduct'' warrants a 1-year suspension from practice before the Board.

ORDER

It is ordered that, effective immediately, Attorney Joel I. Keiler is suspended from practice before the Board for a period of 1 year.

Because of our findings on the allegations of obstruction and delay, we find it unnecessary to pass on the alleged misrepresentations.

[27] The Board's admonition in *Maietta* followed on the heels of its earlier condemnation of Keiler's conduct at the hearing in *Southern Florida Hotel & Motel Assn.*, supra, 245 NLRB at 561 fn. 6.